

BUKIT WAHA QUARRY SDN BHD

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v.

TEGUH PERMATA SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU

b

ABDUL MALIK ISHAK J

[CIVIL SUIT NO: 22-181-1998(1)]

28 JANUARY 2000

CIVIL PROCEDURE: *Pleadings - Amendment - Amendment of statement of claim without leave - Applicable principles - Whether suit turned into suit of another character - Whether defendant prejudiced - Rules of the High Court 1980, O. 20 rr. 1, 4*

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The plaintiff had sued the defendant for payment of debt due and owing. Subsequently the plaintiff amended their writ of summons and statement of claim without leave of the court pursuant to O. 20 r. 1 Rules of the High Court 1980 ('RHC'). The defendant objected to the amendments and applied to the learned Senior Assistant Registrar ('SAR') under O. 20 r. 4 RHC' to disallow the amendment. The SAR dismissed the application. The defendant appealed and argued before the learned judge that: (i) the amendments had denied them the right to raise triable issues during the hearing of the plaintiff's application for summary judgment; (ii) the substitution of the figure RM477,553.33 in the statement of claim with RM459,355.33 would prejudice them; (iii) the amendments would convert the suit from one character to another character.

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Held:

[1] The true and correct facts need to be presented to the court for a proper adjudication of the dispute between the parties. To say that the defendant would be unable to raise triable issues to ward off the plaintiff's application for summary judgment would be tantamount to saying that an amendment however crucial should be refused by the court. This cannot be the law as it goes against the spirit and intendment of O. 20 r. 1 RHC.

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[2] The defendant should not be unjustly enriched purely by the mistake of the plaintiff in pleading the figure RM477,553.33 in the original statement of claim. With regard to the amendment of that quantum to RM459,355.33, if indeed the correct figure was RM477,553.33, there was nothing to stop the defendant from mounting a counterclaim for

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a the amount. Alternatively, the defedant could also rely on the defence of set-off as provided for in O. 18 r. 17 RHC. Clearly, therefore, the defendant is not without a remedy.

b [3] Despite the amendments, the suit remains a suit for debts due and owing whereby the plaintiff has made several payments on behalf of the defendant and also advances to the defendant as stated in para. 3 of the statement of claim. The amendments to items 1, 2, 3, 4, 40, 64 and 65 of the annexure to the statement of claim, for instance, is only for clarification purposes so as not to catch the defendant by surprise and to enable the disputes to be litigated in an orderly fashion. Despite the amendments, therefore, the character of the suit remained the same. It was pure and simple a claim for debt due and owing by the defendant to the plaintiff.

d [4] The learned SAR was correct in dismissing the defendant's application. The amendments by the plaintiff should be allowed and costs should be awarded to the defendant for the injustice, if any, that may be caused by the amendments.

[Appeal dismissed; order accordingly.]

e **Case(s) referred to:**

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 (*refd*)
Amon v. Bobbett 22 QBD 548 (*refd*)

Boss Ramasamy v. Penang Port Sdn Bhd & Anor [1996] 5 MLJ 511 (*refd*)

Bow Maclachlan & Co v. The Camosun [1909] AC 597 (*refd*)

British Anzani (Felixstone) v. International Marine Management (UK) [1979] 2 All ER 1063 (*refd*)

f *Brown Shipley & Co v. Alicia Hosiery* [1966] 1 Lloyds Rep 668 (*refd*)

Casper Trader [1991] 2 Lloyd's Rep 237 (*refd*)

Chin Kok Kwong Construction Sdn Bhd v. Sunrise Towers Sdn Bhd [1984] 2 CLJ 232 (*refd*)

City and Westminster Properties [1934] Ltd v. Mudd [1959] Ch 129 (*refd*)

g *GL Baker Ltd v. Medway Building & Supplies Ltd* [1958] 1 WLR 1216 (*refd*)

Grant Advertising International Inc & Anor v. Glaze [1968] 1 MLJ 31 (*refd*)

Hanak v. Green [1958] 2 All ER 241 (*refd*)

Ismail Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor [1988] 2 CLJ 632 (*refd*)

h *John Trawe Kuda v. Adtec Sdn Bhd* [1996] 4 CLJ 42 (*refd*)

Ketteman & Ors v. Hansel Properties Ltd & Ors [1987] AC 189 (*refd*)

Khong Kim Ching v. Hassan Din & Ors [1973] 2 MLJ 173 (*refd*)

Lim Yong Swan v. Lim Jee Tee & Anor [1993] 1 SLR 500 (*refd*)

Looi Guan Kway v. Low Lean Bok & Ors [1938] MLJ 35 (*refd*)

Lord Hammer v. Flight [1876] 24 WR 347 (*refd*)

i *Mahan Singh v. Government of Malaysia* [1973] 2 MLJ 149 (*refd*)

Nadrep Ltd v. Willmet & Co [1978] 1 All ER 746 (**refd**) **a**
Nelson v. Nelson [1958] 1 WLR 894 (**refd**)
Ng Chai Yang v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors
 [1994] 2 MLJ 336 (**fol**)
Palaniappan v. Universiti Pertanian Malaysia [1995] 1 CLJ 693 (**refd**)
Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 (**refd**) **b**
Philipps v. Philipps [1878] 4 QBD 133 (**refd**)
Re SNVSM Letchumanan Chetty, ex p RMKRV Firm [1936] MLJ Rep 224 (**refd**)
Re William Porter & Co Ltd [1937] 2 All ER 361 (**refd**)
Saga of Bond Street Ltd v. Avalon Promotions Ltd [1972] 2 QB 325 (**refd**)
Shanghai Hall Ltd v. Town House Hotel Ltd [1967] 1 MLJ 223 (**refd**)
Tan Chwee Geok & Anor v. Khaw Yen-Yen & Anor [1975] 2 MLJ 188 (**refd**) **c**
Williams v. Agius [1914] AC 522 (**refd**)
Yong Joo Chuan v. Tan Teck Chiang [1978] 1 MLJ 173 (**refd**)

Legislation referred to:

Rules of the High Court 1980, O. 1 r. 20, O. 2 r. 1(1), O. 18 r. 17, O. 20 rr.
 4(2), 5 **d**

For the plaintiff - Tay Hong Huat; M/s Tay & Helen Wong

For the defendant - Wu Tern Yue; M/s Wu & Co

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Background Facts

A brief chronology of events must be set out in order to understand the case better and these events can conveniently be itemised as follows: **f**

- (1) 20 April 1998 – The writ of summons and the statement of claim were filed by the plaintiff and thereafter served on the defendant.
- (2) 27 June 1998 – The defendant entered an appearance. **g**
- (3) 14 July 1998 – The defendant filed and served the statement of defence and counterclaim dated 13 July 1998.
- (4) 30 July 1998 – The plaintiff filed and served the reply and defence to counterclaim dated 27 July 1998. **h**

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- a* (5) 27 July 1998 – The plaintiff amended the writ of summons and the statement of claim without the leave of the court pursuant to O. 20 r. 1 of the Rules of the High Court 1980 (“RHC”) and not O. 1 r. 20 of the RHC as stated in encl. 9.
- b* (6) 11 September 1998 – The amended writ of summons and the amended statement of claim were served on the defendant.
- c* (7) 24 September 1998 – The defendant applied pursuant to O. 20 r. 4 of the RHC to disallow the amendment.
- (8) 11 March 1999 – The defendant’s application was dismissed by the senior assistant registrar (“SAR”) with each party to bear its own costs.
- d* (9) 13 March 1999 – The defendant filed an appeal to the judge-in-chambers against the decision of the SAR as seen in encl. 30.

Amendment Of The Writ Without Leave Of The Court

- e* Order 20 r. 1(1) of the RHC states as follows:

Subject to paragraph (3), the plaintiff may, without the leave of the Court, amend the writ once at any time before the pleadings to the action begun by the writ are deemed to be closed.

- f* and this was done by the plaintiff and the plaintiff made the following amendments by deleting items 31, 48, 49, 56, 60, 68, 74, 81 and 86 of the annexure to the statement of claim. The details of these deleted items may be stated as follows:

<i>g</i>	31	Bayaran Royalti kepada Koperasi	13.5.1994	RM7,426.00
	48	Bayaran ‘Trip Tax’ (April 94 June 94)	31.8.1996	RM1,872.00
	49	Bayaran ‘Trip Tax’ (July 94 August 94)	31.8.1996	RM2,476.00
<i>h</i>	56	Bayaran kepada Teguh Permata	15.11.1994	RM1,132.00
	60	Bayaran kepada Teguh Permata	5.12.1994	RM1,440.00
	68	Bayaran kepada Teguh Permata	23.1.1995	RM1,223.00

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74	Bayaran kepada Teguh Permata	17.3.1995	RM 635.00
81	Bayaran kepada Teguh Permata	28.4.1995	RM1,215.00
86	Bayaran kepada Teguh Permata	19.6.1995	RM 779.00

The statement of claim was also amended by deleting the total amount of RM477,553.33 to read RM459,355.33. It must be emphasised that minor amendments were also made to items 1, 2, 3, 4, 10, 39, 40, 64 and 65 of the annexure to the statement of claim. These amendments were, however, inconsequential in nature.

The defendant's application to disallow the amendments made without leave under O. 20 r. 4 of the RHC was dismissed by the SAR. Aggrieved by the decision of the SAR, the defendant filed the present appeal as seen in encl. 30 and not encl. 32 as suggested.

General Principles Of Law Together With The Arguments Advanced By The Parties

It is now trite law that the court will always be magnanimous in granting an amendment to pleadings so long as it will not cause an injustice to the other side (*Ismail bin Ibrahim & Ors. v. Sum Poh Development Sdn Bhd & Anor* [1988] 2 CLJ 632; [1988] 3 MLJ 348) and I may add that to cushion the injustice that may be caused to the other side, costs should be awarded as a matter of course. Aitken J enunciated three basic principles to apply in considering an application by the plaintiff to amend the pleadings in the case of *Looi Guan Kway v. Low Lean Bok & 4 Ors.* [1938] MLJ 35, and these three basic principles may be stated as follows:

- (1) there is *bona fide* on the part of the applicant – in this case the plaintiff;
- (2) the amendments will not prejudice the other side and readily be compensated by costs;
- (3) the proposed amendments must not turn a suit of one character into a suit of another and inconsistent character.

A list of authorities can easily be drawn up on the subject matter of amendments and legal practitioners are advised to read them: *Grant Advertising International Inc. & Anor. v. Glaze* [1968] 1 MLJ 31; *Chin Kok Kwong Construction Sdn Bhd v. Sunrise Towers Sdn Bhd* [1984] 2 CLJ 232; [1986] 2 MLJ 41; *Khong Kim Ching v. Hassan bin Din & Ors.* [1973] 2 MLJ 173; *Tan Chwee Geok & Anor. v. Khaw Yen-Yen & Anor.* [1975] 2 MLJ 188 FC; *Yong Joo Chuan v. Tan Teck Chiang* [1978] 1 MLJ 173,

- a* FC; *Mahan Singh v. Government of Malaysia* [1973] 2 MLJ 149; *Palaniappan v. Universiti Pertanian Malaysia* [1995] 1 CLJ 693; [1995] 1 MLJ 353; *Boss s/o Ramasamy v. Penang Port Sdn Bhd & Anor* [1996] 5 MLJ 511; *John Trawe Kuda v. Adtec Sdn Bhd* [1996] 4 CLJ 42; [1996] 5 MLJ 335; and *Abdul Johari bin Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361; [1997] 1 MLJ 629 CA.

b In considering the validity of the amendments, the requirement under O. 20 r. 4(2) of the RHC empowers this court to see what would this court do if an application for leave to make those amendments had been made under O. 20 r. 5 of the RHC. In short, it is necessary for me to consider

c in extenso the scope and ambit of O. 20 r. 5 of the RHC. Order 20 r. 4(2) of the RHC reads as follows:

d Where the Court hearing an application under this rule is satisfied that if an application for leave to make the amendment in question had been made under rule 5 at the date when the amendment was made under rule (1) or rule 3(1) leave to make the amendment or part of the amendment would have been refused, it shall order the amendment or that part to be struck out.

e It is germane to mention that O. 20 r. 5 of the RHC finds a corresponding similarity with that of the English rule and that of the Singapore rule and references to salient authorities from these two countries will do no harm at all. Order 20 r. 5 of the RHC states as follows:

f (1) Subject to Order 15 rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

g (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

h (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

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(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued. **a**

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment. **b**

In *G.L. Baker Ltd v. Medway Building & Supplies Ltd* [1958] 1 WLR 1216, 1231, Jenkins LJ succinctly said that all amendments ought to be granted “for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings”. **c**

In the case of *City and Westminster Properties (1934) Ltd v. Mudd* [1959] Ch 129, [1958] 3 WLR 312, [1958] 2 All ER 733, an amendment was readily allowed by the judge in regard to the defendant’s pleadings which enabled the defendant to successfully rely on the principle of *Re William Porter & Co Ltd* [1937] 2 All ER 361. **d**

In *Nelson v. Nelson* [1958] 1WLR 894, [1958] 2 All ER 744, the Court of Appeal allowed an amendment to a petition by adding a charge of cruelty to a petition for divorce grounded principally on desertion. **e**

Webster J in the *Casper Trader* [1991] 2 Lloyd’s Rep 237 was of the view that it was a case of balancing the applicant’s need to amend and the opposing party’s prejudice that will be exercised by the court before granting the application to amend. Yong Pung How CJ Singapore in *Lim Yong Swan v. Lim Jee Tee & Anor* [1993] 1 SLR 500 agreed with the view of Webster J in the *Casper Trader* (*supra*). What was the true nature and scope of the amendments which the plaintiff sought? It was argued that the amendments that were made by deleting items 31, 48, 49, 56, 60, 68, 74, 81 and 86 of the annexure to the statement of claim had denied the defendant the right to raise triable issues during the hearing of the plaintiff’s application for summary judgment. It was also argued that the amendment made to the total amount of RM477,553.33 to be read as RM459,355.33 would greatly prejudice the defendant. I must at once say that amendments should be made when they are necessary to be made so that the issues of controversy between the parties would be placed before the court for adjudication. It is of paramount importance that the true and **f**
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- a* correct facts are presented to the court for proper adjudication of the dispute between the parties. To say that the defendant would be unable to raise triable issues to ward off the plaintiff's application for summary judgment would be tantamount to saying that an amendment however crucial should be refused by the court. This cannot be the law and I will
- b* not accept it as such. It would not be fair and proper to simply disallow an amendment on the sole ground that such an amendment would defeat the defendant's rights to raise triable issues because an amendment of this nature would simply put all the relevant facts in its correct perspective for the court to weigh in a balance and adjudicate accordingly. To accede and
- c* agree to the contention of the defendant would simply mean that no party can afford to make any mistake at all in drafting the pleading and any amendment which has the effect of depriving the defendant's right to defend the action must not be allowed. This is not a correct exposition of the law as it goes against the spirit and intendment of O. 20 r. 1(1) of the RHC. Lord Brandon in *Ketteman & Ors v. Hansel Properties Ltd & Ors* [1987] AC 189, at p. 212 of the report had this to say:
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- e* With regard to the principles on which his discretion to allow or refuse the applications to amend should be exercised, the judge referred to the notes to RSC Order 20 rule 5, in the Supreme Court Practice 1982 and to the authorities there cited. The effect of these authorities can, I think, be summarised in the following four propositions. First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the
- f* function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that
- g* allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.

- h* This was not a case of a late amendment. The amendments were made with expeditious despatch: three months seven days after the writ of summons and the statement of claim were filed by the plaintiff and thereafter served on the defendant.

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In regard to the amendment of the quantum to RM459,355.33 which the defendant was most unhappy with and if indeed the correct figure was RM477,553.33, there was nothing to stop the defendant from advancing a claim by way of counterclaiming that amount against the plaintiff. In my judgment, the defendant should not be permitted to be unjustly enriched purely by the mistake of the plaintiff in pleading that figure in the original statement of claim. The value of a counterclaim can never be underestimated. It is substantially a cross-action and not merely a defence to the plaintiff's claim. It is in the nature of a separate action (*Bow MacLachlan & Co. v. The Camosun* [1909] AC 597; and *Williams v. Agius* [1914] AC 522). Bower LJ in *Amon v. Bobbett* 22 QBD 548 remarked that:

A counterclaim is to be treated, for all purposes for which justice requires it to be so treated as an independent action.

and clearly, therefore, the defendant in the present appeal was not without a remedy. As demonstrated, the defendant could still proceed by way of a counterclaim against the plaintiff for the difference in the amount subject of course to the available evidence. Alternatively, the defendant could also rely on the defence of set-off. Order 18 r. 17 of the RHC sets out the defence of set-off and it is worded as follows:

Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set-off against the plaintiff's claim, whether or not it is also added as a counter-claim.

When the defence of set-off is relied upon by the defendant, the court has no choice but to weigh that defence in a balance according to the available evidence. The power of the High Court to adjudicate on the defence of set off can never be doubted and that power has been transformed into legislative form as reflected in item 13 to the Schedule of the Courts of Judicature Act 1964. A set-off is a plea where the defendant openly acknowledges the justice of the plaintiff's case but sets up another case of his own to counter balance the claim of the plaintiff, either in whole or in part. And as to whether the matter pleaded constitutes a set-off or otherwise is purely a matter of law and not one of pleading (*Hanak v. Green* [1958] 2 All ER 241, [1958] 2 QB 9 at 26). A valid defence of set-off must revolve on a claim in money and the rule provides that the sum need not have to be ascertained (*Shanghai Hall Ltd v. Town House Hotel Ltd* [1967] 1 MLJ 223). Set-off was considered in many cases and covering many areas; a few examples of them should be of some interest:

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- a* (1) *Brown Shipley & Co v. Alicia Hosiery* [1966] 1 Lloyds Rep 668; and
Saga of Bond Street Ltd v. Avalon Promotions Ltd [1972] 2 QB 325,
where the courts there considered set-off in the context of the bills of
exchange;
- b* (2) *Nadreph Ltd v. Willmet & Co* [1978] 1 All ER 746, where the court
there had occasion to consider the issue of set-off in the context of
the benefit that accrued to the plaintiff arising from the defendant's
wrong.
- c* (3) *British Anzani (Felixstone) v. International Marine Management (UK)*
[1979] 2 All ER 1063, where set-off arose out of a dispute pertaining
to rent.
- (4) *Re S.N.V.S.M. Letchumanan Chetty, Ex parte R.M.K.R.V. Firm* [1936]
MLJ Rep 224, where the court applied set-off to a bankruptcy case.
- d* Next, an argument was advanced on behalf of the defendant to the effect
that the amendments to items 1, 2, 3, 4, 39, 40, 64 and 65 of the annexure
to the statement of claim would convert the suit of one character into
another and inconsistent character. With respect, I beg to disagree. The suit
remains as a suit by the plaintiff against the defendant for debts due and
owing from the defendant whereby the plaintiff has made several payments
e on behalf of the defendant and also advances to the defendant itself as
stated in para. 3 of the statement of claim. As can be seen, amendments
were made to the annexure and these were the particulars of items that
would be added later in the course of the trial. To me, having perused
f through the amendments of the annexure to the statement of claim, the
character of the suit remained the same. It was pure and simple, a claim
of debt due and owing by the defendant to the plaintiff.
- The difference in items 1 and 2 of the annexure to the statement of claim
between "recovery of monies lent to (kepada) A.M. Tan/K.S. Lie" (as per
the original pleading) and "recovery of monies lent via (through) (melalui)
g A.M. Tan/ K.S. Lie" (as per the amendments) were basically confined to
the evidence to be adduced to support the fact that the defendant owed
the plaintiff monies as particularised. The same arguments ring true and
must be vigorously applied to items 3, 4, 39, 40, 64 and 65 of the annexure
h to the statement of claim. The amendments to these items can safely be
said to be for clarification purposes so as not to catch the defendant by
surprise and to enable the disputes between the parties to be litigated in
an orderly fashion. Brett J in *Lord Hammer v. Flight* [1876] 24 WR at
p. 347 aptly said:
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Pleadings now are to be merely concise statements of facts which the party pleading deems material to his case. a

Each party must necessarily plead all the material facts on which he proposes to rely at the trial, otherwise he is not entitled to give any evidence of them at the trial. An important averment must be incorporated as it would be essential to success. Brett LJ in *Philipps v. Philipps* [1878] 4 QBD 133 succinctly said: b

If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial any fact which is not stated in the pleadings. c

Indeed, it must be to circumvent these pitfalls, that the amendments were filed by the plaintiff.

Abdul Malek Ahmad JCA (now FCJ) in *Abdul Johari bin Abdul Rahman v. Lim How Chong & Ors* (*supra*) in a well considered judgment, superbly written summed up the law in these words (at p. 640 of the report): d

The authorities strongly indicate that the courts should lean towards granting applications for amendments even when a new cause of action or line of defence is raised, provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments. e

and applying these sage words, I hold and it was my judgment that what the SAR did was correct when he dismissed the defendant's application to disallow the amendments that was made by the plaintiff without leave. This meant that the appeal by the defendant in encl. 30 must be dismissed and each party to bear its own costs. f

In my judgment, the amendments by the plaintiff to the statement of claim should be allowed and costs should be awarded to the defendant for the injustice, if any, that may be caused by the amendments. g

But that was not the end of the matter. It was argued that the affidavit in encl. 19 and not encl. 18 as suggested was defective. Enclosure 19 was an affidavit affirmed by Lie Khin Sin on 26 October 1998 and filed on 31 October 1998. But the name of Lie Khin Sin was also spelt as Lie Khin Shin as seen at the beginning of the affidavit. Because of this difference in spelling it was argued that this created a doubt as to the actual identity of the deponent in encl. 19 and, consequently, the plaintiff ought not to be allowed to refer to encl. 19. A perusal of the court file showed the following state of affairs: in encl. 23 the name "Lie Khin Shin" which was obviously erroneous was distinctly deleted at p. 1 thereof and replaced with h
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- a* the correct spelling of “Lie Khin Sin” and it was initialled by the commissioner for oaths. In other words both these two names referred to one and the same person, namely Lie Khin Sin. At any rate, in both encls. 19 and 23 the same passport number of the deponent was stated and this impelled this court to invoke O. 2 r. 1(1) of the RHC to cure such an irregularity. *In Ng Chai Yang v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1994] 2 MLJ 336, I had occasion to say, at p. 341 to p. 342 of the report, the following which should be vigorously applied in favour of the plaintiff in the present appeal:

- c* It is basic and fundamental that in the course of litigation, rules of procedure must be observed. But the courts have from time to time aware of the danger that too rigid an adherence to the rules in certain circumstances may inappropriately and unjustly deprive a party of his rights. For instance, O. 2 r. 1 of the RHC says that non-compliance with a rule of procedure at whatever stage of the proceedings ‘whether in respect of time, place, manner, form or content or in any other respect’ is to be treated as an irregularity. It does not automatically ‘nullify the proceedings, any step taken in those proceedings, or any document, judgment or order therein’. But the court is nevertheless empowered to set aside ‘wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein’ or to allow an amendment or ‘to make such order ... generally as it thinks fit’.
- d* Incidentally, the court may also make an ancillary order as to costs or other terms as may be just. In short, O. 2 r. 1 of the RHC strictly concerns the discretion exercisable by the court when it is faced with non-compliance.

- e* I am of the considered view that no irregularity or defect, whatever its nature, automatically renders the proceeding a nullity. The court is still empowered to consider each case on its merits and make whatever decision it deems just. I am fortified in my view by a passage appearing in the judgment of Cumming-Bruce LJ in *Metroinvest Ansalt v. Commercial Union Assurance Co Ltd* [1985] 1 WLR 513; [1985] 2 All ER 318, to the following effect [at p 521F-G]:

- f* I would say that in most cases the way in which the court exercises its powers under O. 2 r. 1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe O. 2 r. 1(2)
- g* as being so framed as to give the court the widest possible power in order to do justice.

- h* and the very same case was also reported in the All Malaysia Reports *vide* [1994] 2 AMR 23. It was to do justice that I must cure encl. 19 of its irregularity and accept it as it were in order to enable the plaintiff to rely
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on it. There was no prejudice suffered by the defendant as a direct consequence of that irregularity and this was my judgment and I so hold accordingly. a

Next, it was argued that the wrong procedure was adopted by the plaintiff in amending the statement of claim. The endorsement at the top right hand corner of encl. 9 should be O. 20 r. 1 and not r. 20 O. 1. The mistake was admitted by the plaintiff and even the SAR overlooked this mistake. I accordingly invoked O. 2 r. 1(1) of the RHC to cure this obvious irregularity. There was no prejudice suffered by the defendant at all as a result of this minor irregularity and I so hold accordingly. b

This appeal revolved entirely on the amendments of the statement of claim by the plaintiff. Lord Griffiths in *Ketteman & Ors v. Hansel Properties Ltd & Ors (supra)* said at p. 220 of the report: c

Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. d

and I hasten to add that each case depends on its own facts and the courts must adopt a robust approach and be magnanimous in allowing amendments so as to do justice to all the litigants. In *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat (also known as Eugene Tay Yong Huat) & 5 Ors* [1999] 2 CLJ 886; at p. 899, I did say as follows: e

The paramount function and duty of the courts would be to see that justice is done in all cases to all parties. As Lord Denning MR once said in *Doyle v. Olby Ltd* [1969] 2 QB 159, 166: f

We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side. g

and the same case has since been reported in two other popular local law journals, namely: h

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a (1) [1999] 2 CLJ 886; and

(2) [1999] 5 MLJ 558.

For the reasons adumbrated above, I dismissed encl. 30 and ordered each party to bear its own costs. The amendments to the statement of claim were

b allowed and costs should be awarded to the defendant for the injustice that may be occasioned by the amendments thereto.

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